

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Broadcast Indecency Complaints)	GN Docket No. 13-86
Egregious Cases Policy)	

**REPLY COMMENTS OF
ABC TELEVISION AFFILIATES ASSOCIATION**

Wade H. Hargrove
Mark J. Prak
David Kushner
Julia C. Ambrose
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Wells Fargo Capitol Center, Suite 1600
150 Fayetteville Street (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300

*Counsel for ABC Television
Affiliates Association*

August 2, 2013

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Broadcast Indecency Complaints)	GN Docket No. 13-86
Egregious Cases Policy)	

**REPLY COMMENTS OF
ABC TELEVISION AFFILIATES ASSOCIATION**

The ABC Television Affiliates Association¹ (the “ABC Affiliates”) respectfully submits these reply comments in response to the Public Notice (“*Notice*”) seeking comment on the question whether the Commission “should make changes to its current broadcast indecency policies or maintain them as they are.”²

The ABC Affiliates endorse the view expressed by a number of commenters that the Commission must change its current broadcast indecency policy and return to its historically restrained indecency enforcement scheme that predated the *Golden Globes Order*³ under which fleeting words and images were not considered actionably indecent. This change is required by

¹ The ABC Television Affiliates Association is a non-profit trade association whose members consist of local television broadcast stations throughout the country that are affiliated with the ABC Television Network.

² See *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, Public Notice, 28 FCC Rcd 4082 (Apr. 1, 2013).

³ *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd 4975 (2004) (“*Golden Globes Order*”).

the First Amendment. As the Supreme Court’s decision in *FCC v. Pacifica Foundation*⁴ makes clear, the Commission cannot, consistent with the First Amendment, proscribe the broadcast of an isolated and unrepeatable expletive or a brief glimpse of non-sexual nudity. Instead, the Commission is limited by the First Amendment to regulating repetition of indecent material amounting to verbal or visual “shock treatment.” The Commission’s post-*Golden Globes* indecency enforcement policy, which punishes the utterance of even fleeting expletives and momentary, non-sexual nudity, exceeds the limits defined by *Pacifica* and must be corrected.

The ABC Affiliates also agree with the suggestion made by several commenters that the Commission must implement meaningful procedural protections in its indecency enforcement regime, both to provide the clarity essential to the exercise by broadcasters of their First Amendment rights and to ensure that unresolved indecency complaints are not permitted to exert an *in terrorem* effect on unrelated broadcast regulatory proceedings and applications.

I. *Pacifica* Defines the Outer Limits of the Commission’s Authority to Regulate Broadcast Indecency Consistent with the First Amendment

The ABC Affiliates agree with numerous commenters⁵ who urge the Commission to return to a more restrained broadcast indecency enforcement policy defined and limited by the Supreme Court’s decision in *Pacifica*. No other result can be squared with the First Amendment, because the Court in *Pacifica* defined the outer limits of the Commission’s authority to regulate

⁴ *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

⁵ See, e.g., Comments of the National Association of Broadcasters (“NAB Comments”) at 12-16; Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (“Fox Comments”) at 10-11, 19-22; Comments of CBS Television Network Affiliates Association and NBC Television Affiliates (“CBS and NBC Affiliates Comments”) at 4-6; see also Comments of ABC, Inc. (“ABC Comments”) at 24, 30-31.

broadcast indecency.

Constitutional protection of indecent speech is the background rule against which the Commission's broadcast indecency enforcement policy must operate, because "expression which is indecent but not obscene is protected by the First Amendment."⁶ *Pacifica* considered the Commission's attempt to regulate the daytime broadcast of George Carlin's "Filthy Words" monologue against this backdrop of constitutional protection and, in doing so, established the constitutional limits of the Commission's authority to regulate broadcast indecency. As *Pacifica* makes clear, the First Amendment does not permit the Commission to censor fleeting, unrepeatable expletives or brief glimpses of non-sexual nudity. In a portion of the opinion that commanded a majority of the Court, *Pacifica* noted that its emphatically "narrow[]" holding did not "involve a . . . telecast of an Elizabethan comedy" or decide[] that an occasional expletive in [that] setting would justify any sanction"⁷

Any doubt about the narrow scope of the regulatory authority endorsed by *Pacifica* is eliminated by the separate concurring opinion of Justice Powell, without which there would have been no majority. Writing separately to underscore that *Pacifica* should not be read to confer upon the Commission "an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from *momentary* exposure

⁶ *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). See also *Carey v. Population Servs., Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."); *United States v. Playboy Entm't Group*, 529 U.S. 803, 814 (2000); *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Action for Children's Television v. FCC*, 59 F.3d 1249, 1253 (D.C. Cir. 1995).

⁷ *Pacifica*, 438 U.S. at 750.

to it in their homes,”⁸ Justice Powell approved of Commission regulatory authority of only the narrowest scope: “The Commission’s holding, and certainly the Court’s holding today, does not speak to cases involving the *isolated* use of a potentially offensive word in the course of a radio broadcast, as distinguished from the *verbal shock treatment* administered by respondent here.”⁹ Justice Powell’s opinion, then, makes clear where *Pacifica* draws the line between permissible regulation of speech and unlawful censorship: *Pacifica* allows the Commission to regulate broadcast indecency akin to the “verbal shock treatment” administered by the Carlin monologue but does not sanction the suppression of any other categories of protected speech, including “isolated” offensive words or brief glimpses of non-sexual nudity.¹⁰

The expansive indecency enforcement regime ushered in by the *Golden Globes Order* ignores the unmistakable limits of *Pacifica*: The Constitution permits Commission regulation of broadcast indecency in only the narrowest of circumstances, leaving all indecent speech *other than* the sort of “verbal shock treatment” at issue in that case fully protected against regulation.¹¹

⁸ *Id.* at 759-60 (Powell, J., concurring in part and concurring in the judgment) (emphasis added).

⁹ *Id.* at 760-61 (Powell, J., concurring in part and concurring in the judgment) (emphases added).

¹⁰ That reading is further bolstered by the separate opinion of Justice Brennan, who noted that *Pacifica* could not be cited “as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the relentless repetition, for longer than a brief interval, of ‘language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs.’” *Pacifica*, 438 U.S. at 772 n.7 (Brennan, J., dissenting) (emphases added); *see also id.* at 771 (noting that plurality and concurring opinions “do no more than permit the Commission to censor the afternoon broadcast of the ‘sort of *verbal shock treatment*’ . . . involved here” but otherwise seek to “insure that the FCC’s regulation of protected speech does not exceed these bounds” (emphasis added)).

¹¹ In the wake of the Supreme Court’s *Pacifica* decision, the Commission recognized as
(continued . . .)

A return to a restrained indecency enforcement policy defined and limited by *Pacifica*'s requirement of deliberate repetition would go far toward restoring the certainty and predictability essential to protecting broadcasters' First Amendment rights. For the reasons explained by multiple commenters, the First Amendment demands that the Commission's indecency enforcement policies be clear, consistent, predictable, and appropriately deferential to the artistic judgments and editorial discretion of broadcasters and content providers.¹² Only an indecency enforcement scheme faithful to *Pacifica*'s limitations can satisfy these demands.

II. The Commission Must Implement Meaningful Procedural Protections for Broadcasters in Connection with Its Indecency Enforcement Efforts

For the reasons explained above, the ABC Affiliates agree with numerous commenters that, in light of *Pacifica*, the Commission's indecency enforcement policies must unambiguously exempt fleeting, isolated expletives and momentary, non-sexual nudity from regulation.¹³ The

(. . . continued)

much when it declared that "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." *Pacifica Found., Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 2698 (1987), ¶ 13. *See also Regents of the Univ. of California*, Memorandum Opinion and Order, 2 FCC Rcd 2703 (1987), ¶ 3 ("Speech that is indecent must involve more than an isolated use of an offensive word."); *WPBN/WTOM License Subsidiary, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 1838, 1841 n.5 (2000) (explaining that determining whether a nude image is indecent requires "an analysis of whether the allegedly indecent material is isolated or fleeting").

¹² *See, e.g.*, NAB Comments at 16-20 (describing inconsistency and unpredictability in Commission's post-*Golden Globes* decisions); *id.* at 20-22 (explaining and illustrating the chilling effect of the Commission's inconsistent, arbitrary indecency regulation on broadcasters' protected speech, including local and national news coverage and particularly live coverage of newsworthy special events and emergencies); ABC Comments at 29-30 (describing the "chilling impact" of the uncertainty inherent in the Commission's indecency regime).

¹³ *See, e.g.*, NAB Comments at 28; *see also* ABC Comments at 18-25 (urging the Commission to "abandon its policy of sanctioning fleeting, spontaneous expletives and nudity in
(continued . . .)

ABC Affiliates further agree that any indecency enforcement regime implemented by the Commission must include procedural mechanisms designed to ensure that indecency complaints are factually well-grounded, are made by *bona fide* complainants, and are considered and resolved by the Commission in a fair and efficient manner that avoids imposing unnecessary burdens on broadcasters. Perhaps most importantly, the Commission's indecency enforcement scheme must respect and defer to broadcasters' good-faith editorial decisions about the content of programming they choose to air, as both the First Amendment and the "public trustee" model of broadcast regulation command. Only by incorporating these essential procedural protections into the indecency enforcement regime can the Commission ensure that broadcasters' core First Amendment rights are not unnecessarily encroached upon.

In particular, the ABC Affiliates urge the Commission to adopt, at a minimum, the following procedural rules:

First, in light of the constitutional rule articulated in *Pacifica*, the Commission should clarify that news, sports, and public affairs programming, and live programming in particular, are altogether exempt from indecency enforcement. As other commenters have explained,¹⁴ television broadcasters serve their communities and discharge their public interest responsibilities by providing in-depth coverage of important news, weather, traffic, current events, and other public interest programming, much of which is broadcast live.

(. . . continued)

live programming and return to its pre-2004 policy"); *id.* at 40 (contending that "the Commission should, at a minimum, make clear that an indecency finding requires both (1) a clear, direct, graphic, unobscured visual or verbal depiction of a sexual or excretory organ or activity, and (2) sufficient duration or repetition of the depiction to constitute the equivalent of verbal or visual 'shock treatment'").

¹⁴ See CBS and NBC Affiliates Comments at 2-3; see also ABC Comments at 25-30 (urging the Commission to exempt "bona fide news, documentary, [and] serious public affairs programming" from indecency regulation).

Notwithstanding precautions taken by broadcasters, such live coverage carries the risk that occasional uncensored expletives or images will make their way through to viewers and listeners.

Second, every indecency complaint must be made by a *bona fide* complainant—that is, a viewer or listener who (1) certifies that he or she actually watched or heard the allegedly offending material at the time and on the station identified in the complaint,¹⁵ (2) specifically and clearly identifies the material alleged to be indecent, and (3) attests that he or she has lodged the complaint upon a considered decision to do so, rather than at the prompting of a third party via a computer-generated form or mass solicitation.¹⁶ Complaints that fail to meet these minimum thresholds should be dismissed without further action by the Commission.

Third, the Commission should reaffirm that, to be found actionably indecent, the complained-of material must, *at a minimum*, satisfy the Commission’s substantive definition of indecency—that is, the material must “describe or depict sexual or excretory organs or activities.”¹⁷ Applying this requirement would foreclose indecency findings based on innuendo.¹⁸ Complaints that are not predicated on material that meets the Commission’s

¹⁵ See *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299 (2006), ¶¶ 75-77 (dismissing several indecency complaints filed by a single complainant because “none of the complaints contains any claim that the out-of-market complainant actually viewed the complained-of broadcasts on KMBC-TV or any other ABC affiliate where the material was aired outside of the safe harbor”).

¹⁶ See, e.g., NAB Comments at 34-35 (indecency complaints must make out “[a] *prima facie* case of licensee misconduct” based on “specific evidentiary facts”) (quotation omitted); Fox Comments at 39.

¹⁷ See *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999 (2001), ¶ 7.

¹⁸ See NAB Comments at 26-28 (discussing Commission’s post-*Golden Globes* Order decisions that found non-literal, emotive use of expletives and suggestive material that contained
(continued . . .)

indecent definition should be dismissed at the threshold.

Fourth, the Commission should adopt rules requiring the submission (by complainants) and the administrative resolution (by the Commission) of indecency complaints within specific, enforceable deadlines, in order to avoid any potential for the pendency of indecency proceedings to have an *in terrorem* effect on broadcasters' protected speech.¹⁹ As other commenters have noted, the Commission's implementation of its enforcement scheme has effectively deprived licensees of prompt judicial review of indecency proceedings—indeed, even of basic information necessary to evaluate and respond to pending complaints.²⁰ The Commission's failure to act in a timely manner in resolving pending indecency complaints and concluding enforcement proceedings is, itself, a *de facto* prior restraint because broadcasters are forced to censor their speech to ensure that they will not be subject to indecency proceedings with their attendant long delays, untoward effects on pending applications and other unfavorable regulatory consequences, unavailability of prompt judicial review, and potentially crippling fines. The Commission's lack of timely disposition of indecency complaints is an affront to fundamental motions of due process.

(. . . continued)

no nudity to be actionably indecent, contrary to the Commission's own indecency definition).

¹⁹ See, e.g., Joint Reply Comments of the Named State Broadcasters Associations at 9-10 (proposing (1) a 30-day deadline for determining whether an indecency complaint is *prima facie* actionable and, if so, providing a copy of the complaint to the licensee, who would be required to file a response within 30 days, and (2) a deadline of 120 days from receipt of the licensee's response for resolution of the complaint, to ensure that complaints do not remain pending indefinitely, thereby chilling speech).

²⁰ See NAB Comments at 23-25, 35-37 (describing the effect of Commission enforcement practices on pending applications and the Commission's frequent failure to resolve indecency claims in a timely manner in order to allow prompt judicial review of agency action); Fox Comments at 31-34.

III. The Commission Should Not Adopt an Indecency Enforcement Scheme That Turns on the “Egregiousness” of a Challenged Broadcast

The *Notice* does not expressly propose an indecency enforcement policy that turns on the “egregiousness” of a challenged broadcast, but ABC Affiliates join other commenters²¹ in voicing concern that the *Notice* is titled “FCC . . . Seeks Comment on Adopting Egregious Cases Policy.” To the extent the *Notice* suggests that “egregiousness” may serve as an appropriate yardstick for determining broadcast indecency, ABC Affiliates submit that “egregiousness” is far too uncertain and subjective a standard for measuring indecency, particularly when the Commission has not even attempted to define the inherently open-ended term in a way that would provide meaningful guidance to broadcasters and the public.

An indecency enforcement scheme that takes into account so-called “egregiousness” merely invites the Commission to make subjective value judgments about the merits of challenged programming under the guise of determining whether the challenged content is sufficiently “egregious” to warrant sanctions. Such a policy would not only be unfair to broadcasters, who have no way of knowing what material the Commission might find sufficiently “egregious,” but it would be unconstitutional as well. Put differently, an “egregious cases policy” would do nothing to correct the current policy’s failure to provide broadcasters with consistent, clear, and predictable guidelines, notice, and due process about what material the Commission may deem indecent but, instead, would exacerbate the defects in the current enforcement policy, which already is riddled with vagueness and inconsistency. The sure result

²¹ See, e.g., NAB Comments at 29 (contending that the Commission “must use language that is as precise as possible and provide relevant examples and context in its indecency policies and decisions”); ABC Comments at 17-18.

would be a scheme of censorship contrary Section 326 of the Communications Act and repugnant to *Pacifica* and the First Amendment.

Conclusion

For the foregoing reasons, the ABC Affiliates respectfully urge the Commission to return to a restrained broadcast indecency enforcement scheme consistent with and limited by *Pacifica* and accompanied by procedural protections intended to ensure that broadcasters' protected speech is not chilled.

Respectfully submitted,

ABC TELEVISION AFFILIATES ASSOCIATION

/s/

Wade H. Hargrove
Mark J. Prak
David Kushner
Julia C. Ambrose
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Wells Fargo Capitol Center, Suite 1600
150 Fayetteville Street (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300

*Counsel for ABC Television Affiliates
Association*

August 2, 2013